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**IN THE
COURT OF APPEALS OF INDIANA**

DONNA MOORE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee.

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No. 40A01-0607-CR-319

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0508-FA-00171

July 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a jury trial, Appellant, Donna Moore, was convicted of one count of Neglect of a Dependent Resulting in Death as a Class A felony,¹ Battery as a Class D felony,² and False Informing as a Class A misdemeanor.³ Moore presents five issues upon appeal, which we renumber and restate as:

- I. Whether the evidence is sufficient to support her conviction for False Informing;
- II. Whether she is entitled to a new trial upon the Battery and Neglect charges; and
- III. Whether the trial court's imposition of the maximum sentence was proper.

We affirm in part, reverse in part, and remand with instructions.

The relevant facts are that on March 3, 2000, Moore gave birth to a son, S.M. In 2002, Moore was investigated in Ohio by the Belmont County Department of Job and Family Services, Children Services Division, regarding allegations that she had physically abused S.M. by flicking his penis with her finger. Moore had been living with Stacey Moore, S.M.'s father, in Ohio, but the couple separated in October 2004. In 2005, Moore moved in with Aaron Rohr, who lived in North Vernon, Indiana.

Rohr physically abused S.M. On one particular occasion, Moore's friend Brenda Randolph visited Moore at Rohr's home and saw Rohr spank S.M. on his bare bottom, leaving bruises. Rohr asked S.M. questions, and when he did not like the answer that S.M. gave, he would hit the child again. Moore was present but said or did nothing to

¹ Ind. Code § 35-46-1-4(b)(3) (Burns Code Ed. Repl. 2004).

² Ind. Code § 35-42-2-1(a)(2)(B) (Burns Code Ed. Repl. 2004).

³ Ind. Code § 35-44-2-2(d)(1) (Burns Code Ed. Repl. 2004).

intervene. S.M., apparently frightened, began to urinate. In response, Rohr grabbed the top of S.M.'s penis and squeezed it in an attempt to prevent the child from urinating on the floor. Although the child cried in pain, Moore did nothing to stop Rohr. Shortly after this incident, Moore and Randolph noticed that S.M.'s testicles were bruised and bleeding. Randolph also saw bruises on S.M.'s front, back, and side. Randolph warned Moore that if she did not do something to stop Rohr, "something [was] going to happen to [S.M.] and they [i.e., Moore and Rohr] [were] both going to be in trouble." Tr. at 846. Although Moore told Randolph that she would speak to Rohr, she also said that she would not be in trouble because she would not "be home." Id.

Shortly before noon on April 23, 2005, Moore left S.M. with Rohr while she went to work. When she returned home later that night, Rohr told Moore that S.M. had vomited twice that day. Moore did not check on S.M. immediately, but before she went to bed that night, she and Rohr looked in on the boy. S.M. was lying in bed in a pool of his own vomit. Moore proceeded to undress S.M. with the intent to clean him up. S.M. was unresponsive. Rohr pushed or nudged S.M., who fell to the ground, hitting his head on a nearby dresser. S.M. was not breathing and was unresponsive. Moore and Rohr then drove S.M. to the local hospital.

Dr. Syed Hakim, who worked in the emergency room, observed that both of S.M.'s pupils were fixed and that the left pupil was dilated indicating severe brain injury and swelling. Dr. Hakim suspected that S.M.'s brain was bleeding, which his hospital was ill-equipped to treat, so he arranged for the child to be sent to Riley Hospital in Indianapolis. In addition to his head injury, S.M. had bruises on his back, front, the

inside of his thigh, his left elbow, his groin area, his chin, his waist, both sides of his buttocks, and his penis and scrotum, which were swollen. Because of the nature of S.M.'s injuries, the hospital staff contacted the police.

After taking S.M. to the hospital, Rohr drove back to his residence and then returned to the hospital, quietly telling Moore that they should not mention "smacking" S.M.'s legs. Tr. at 422. Rohr also told Moore that he had "got rid of what he could have, but not all of it." Tr. at 444.

S.M. arrived at Riley Hospital in the early hours of the next morning. He was near death at that time. Doctors at Riley nevertheless performed emergency surgery on S.M., removing a portion of his skull to allow room for his brain to swell in a last-ditch effort to save his life. The doctors at Riley observed that S.M. had bleeding around his brain and swelling of the brain tissue. They also observed that S.M. was covered in extensive bruises.

During the subsequent investigation into S.M.'s injuries, Moore admitted that she had seen the bruises on her son's legs, buttocks, and groin area and that these bruises were caused by Rohr "smacking" S.M. She also admitted that some of the bruises on S.M.'s buttocks were caused by her "spanking" S.M. Tr. at 905. Moore stated that she had given S.M. ice to put on his genitals when he complained of the pain. Moore claimed that the injuries to S.M.'s genitals were caused by S.M. moving while Rohr hit him and also by S.M. dropping the toilet seat onto his penis. Moore admitted that Rohr had "a temper" and had "crossed the line" while spanking S.M. on one occasion. Tr. at 490, 1675-76. Moore claimed that Rohr would whip S.M. with either a belt or his hand.

Moore admitted to whipping the child with a belt and stated that she had spanked S.M. so hard in the past that she had broken blood vessels in her hand and had learned to “cup” her hand while hitting him to avoid this. Moore claimed that she had spoken with Rohr with regard to how hard he hit S.M. Moore also stated that she had recently noticed more bruising on S.M.

On April 26, 2005, S.M. died as a result of blunt force injuries to his head and brain. The bleeding in S.M.’s brain was caused by severed blood vessels. S.M. also suffered retinal hemorrhages in both eyes and an “axonal” injury, which is an injury to the connection between neurons. S.M.’s brain injury was similar to the injury sustained by those in automobile accidents and could not have been accidental. S.M.’s injuries were most likely caused by forceful blows, picking up S.M. and throwing him, hitting his head against an object, and violent shaking followed by an impact. After sustaining such injury, S.M. would have immediately exhibited symptoms such as limpness, seizures, vomiting, lethargy, and a decrease in breathing.

Dr. Michelle Cattelier, a pathologist, observed approximately seventy-seven bruises on S.M.’s body. Dr. Cattelier also noted the overlapping of bruises, including several “patterned” types of bruises which are consistent with being hit with different objects. According to Dr. George Nichols, a forensic pathologist, the injuries to S.M.’s genitals were caused by being struck with an object or an open hand and could not have been caused by a toilet seat. Dr. Cattelier testified that some of the bruises on S.M.’s body were older than others, indicating that they were suffered over a period of time, not all at once. The bruises found on S.M.’s skull were consistent with being hit with a broad

object such as a hand. While the police investigated S.M.'s death, Moore told her friend Randolph that if she testified, the State would take away Randolph's children, so Randolph should not tell "anybody anything." Tr. 882.

The State eventually charged Rohr with murder as a result of S.M.'s death. Rohr was convicted, but after an appeal to our Supreme Court, his conviction was overturned and the case remanded for retrial. See Rohr v. State, 866 N.E.2d 242 (Ind. 2007). On August 11, 2005, after Rohr's initial conviction, the State charged Moore with one count of neglect of a dependent resulting in death, a Class A felony, one count of battery on a child under fourteen years of age, a Class D felony, and false informing as a Class A misdemeanor. A jury found Moore guilty as charged on April 20, 2005. The jury also found beyond a reasonable doubt that the State had established the following as aggravating factors: (1) that the victim, S.M., was less than twelve years of age, specifically, five years old; (2) that Moore violated her position of trust with S.M.; (3) that Moore had shown a lack of remorse; (4) that the nature and circumstances of the crime were more heinous than the elements necessary to prove the commission of the crime; (5) that S.M. was physically infirm; (6) that S.M. had previously received one or more severe beatings from Moore; (7) that Moore did not cooperate with law enforcement agencies in the investigation of S.M.'s death; and (8) that Moore had a prior history of abusing S.M. At a sentencing hearing held on May 22, 2006, the trial court sentenced Moore to consecutive sentences of fifty years upon the neglect conviction, three years upon the battery conviction, and six months on the false informing conviction. Moore filed a notice of appeal on June 15, 2006.

I

Sufficiency of Evidence for False Informing

Moore first claims that the evidence presented at trial is insufficient to support her conviction for false informing.⁴ Upon review of a challenge to the sufficiency of the evidence, we neither reweigh evidence nor judge witness credibility. Proffit v. State, 817 N.E.2d 675, 680 (Ind. Ct. App. 2004), trans. denied. Instead, we consider only the evidence which supports the convictions and the reasonable inferences to be drawn therefrom. Id.

The statute defining the crime of false informing states in relevant part:

“(d) A person who:

- (1) gives a false report of the commission of a crime or gives false information in the official investigation of the commission of a crime, knowing the report or information to be false;

* * *

commits false informing, a Class B misdemeanor. However, the offense is a Class A misdemeanor if it substantially hinders any law enforcement process or if it results in harm to an innocent person.” I.C. § 35-44-2-2.

Tracking this statutory language, the charging information filed against Moore alleged that:

“On or about the 24th day of April, 2005, in Jennings County, State of Indiana, DONNA J. MOORE did knowingly or intentionally give false information in the official investigation of the commission of a crime, knowing the information to be false which substantially hinder[ed] any law enforcement process, to-wit: Donna J. Moore denied previous welfare investigations concerning [S.M.] during the investigation of [S.M.]’s severe head injury.” App. at 40.

⁴ Moore makes no direct challenge to the sufficiency of the evidence supporting her convictions for battery and neglect of a dependent.

To support this charge, the State introduced evidence at trial that Moore had been interviewed by Dave Turner of the Jennings County Sheriff's Office and Nancy Schoenbein of the Indiana Department of Child Services. During the interview, the following colloquy took place:

“Turner: Well Donna that is all important, you can talk about them but it is someone[,] it's an adult who had done this you know[,] [Y]ou have had suspicions haven't you honestly?

[Moore]: I know that [S.M.] gets disciplined for telling lies.

Turner: Who does that? Aaron [Rohr]?

[Moore]: Aaron. I don't discipline my son unless he tells me a lie then I put [him] in time out.

Turner: Haven't you seen the bruises on his legs though?

[Moore]: I have seen those.

Turner: Doesn't that concern you at all? Didn't you think[,] wasn't th[at] a red flag honestly?

[Moore]: I have dealt with this from the time [S.M.] started walking. He bruises very easily just as the same as I do.

Turner: Donna.

[Moore]: I am telling you; I have gone through this before.

Turner: I'm not doubting

[Schoenbein]: *Have you been involved with CPS in Ohio?*

[Moore]: *No I have not.*

Turner: Somebody saw the bruises?

[Schoenbein]: *Has CPS ever been to your home?*

[Moore]: [unintelligible].

[Schoenbein]: *Have you ever been interviewed by police? So when we check there will be no records in Ohio?*

[Moore]: *Nope.*” State's Exhibit 15 at pp. 8-9 (emphasis supplied).

Upon appeal, Moore claims that she cannot have committed the crime of false informing because her response to Turner and Schoenbein's questions was not

technically false. Moore admits that she had been investigated in Ohio by the Belmont County Department of Job and Family Services, Children Services Division. She therefore claims that when she answered negatively to the question of whether she had been “involved with CPS in Ohio,” she did not give *false* information in the official investigation of a crime as required by statute.

The State acknowledges that neither Turner nor Schoenbein referred to the proper name of the Ohio agency which had previously investigated Moore but claims that the references to “CPS” or “CPS in Ohio” and the more general question about “records” in Ohio establish that Moore was being questioned generally about prior welfare investigations. We are unable to agree.

It is well established that criminal statutes are to be construed narrowly. Matthews v. State, 849 N.E.2d 578, 585 (Ind. 2006). Here, the false informing statute penalizes the giving of *false* information in the official investigation of the commission of a crime by one who knows the information to be false. I.C. § 35-44-2-2(d)(1). It is undisputed that the response given by Moore, i.e. that she had not been investigated by “CPS” in Ohio was not false. While it is apparent from the record that Moore was not being forthcoming with the investigation and was not even being entirely truthful, the fact remains that she simply was *not* investigated by “CPS” in Ohio.

The State also argues that Moore gave false information when she replied in the negative to the question, “Have you ever been interviewed by police? So when we check there will be no records in Ohio?” According to the State, this question referred to any “records” in Ohio, and there were in fact records of an investigation in Ohio by the

Belmont County Department of Job and Family Services, Children Services Division. To this Moore responds that by the context of the question, it was apparent that the reference to “records” meant police records. We acknowledge that this is a closer call, because the question as asked could be construed to mean whether there were any “records” of a welfare investigation in Ohio (which there were) or whether there were any records of a police investigation (which there were not).

While we do not reweigh evidence or judge the credibility of witnesses, we must still determine whether there is evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt whether the defendant was guilty of the crime charged. Proffitt, 817 N.E.2d at 680. Here, we conclude as a matter of law that Moore’s response to this ambiguous question cannot be considered to have proved beyond a reasonable doubt that she gave false information, knowing that information to be false. We therefore instruct the trial court upon remand to vacate Moore’s Class A misdemeanor conviction for false informing.

II

Retrial Upon Remand

Moore next claims that because her conviction for false informing must be vacated, she is entitled to a new trial upon the battery and neglect convictions because the evidence regarding her false informing conviction “unfairly tainted” her trial on the

remaining counts.⁵ Moore argues that she was entitled to severance of the charges because they were separate and distinct crimes, and that she is therefore also entitled to a new trial if any one of her three convictions is reversed. While inventive, Moore's argument is not persuasive.

As noted by Moore, Indiana Appellate Rule 66(D) provides:

“New Trial or Hearing. The [Appellate] Court shall direct that Final Judgment be entered or that error be corrected without a new trial or hearing unless this relief is impracticable or unfair to any of the parties or is otherwise improper. If a new trial is necessary, it shall be limited to those parties and issues affected by the error unless this would be impracticable or unfair.”

This court routinely reverses one or more convictions while letting stand one or more remaining convictions without requiring retrial. Moreover, with regard to Moore's claims about the severability of the charges, there is no indication that Moore requested severance at trial. Moore does not otherwise explain why reversal of her false informing conviction requires a new trial on the remaining convictions, and we see no reason why retrial would be required.

III

Sentencing

Moore lastly claims that the trial court erred in imposing sentence. As noted, the trial court imposed enhanced, consecutive sentences totaling fifty-three and one-half

⁵ We consider it implausible that any reasonable jury would be inclined to convict upon the neglect and battery charges based upon an incident of false reporting relating to activity and records in a different state.

years. Of course, now that we have ordered the trial court to vacate the false informing conviction, Moore's sentence stands at fifty-three years.⁶

Generally, sentencing decisions lie within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. Leffingwell v. State, 793 N.E.2d 307, 309 (Ind. Ct. App. 2003). When imposing an enhanced sentence, a trial court is required to state its specific reasons for doing so, and the court's sentencing statement must: (1) identify significant aggravating and mitigating circumstances, (2) state the specific reason why each circumstance is aggravating or mitigating, and (3) demonstrate that the aggravating and mitigating circumstances have been weighed to determine that the aggravators outweigh the mitigators. Id. The trial court is responsible for determining the appropriate weight to give aggravating and mitigating circumstances. Id.

Moore first attacks the sentence imposed by the trial court by claiming that the trial court relied upon several improper aggravating factors and overlooked a significant mitigating factor. Based upon the aggravating factors found by the jury, the trial court made the following statement at the sentencing hearing:

“With regard to those aggravators [found by the jury], I cannot ignore them, but I am entitled to give them their appropriate weight and then I have to consider whether there are any mitigators. The Court finds that each of the Eight (8) aggravators found by the Jury, in fact exist in this case, however . . . Aggravators Six (6) and Eight (8) are, are nearly identical and for the purpose of sentenc[ing], the Court finds that they should merge. Significant weight is going to be given to the fact that [S.M.] was under

⁶ We also note that the crimes for which Moore was convicted were committed before April 25, 2005. On April 25, 2005, Indiana's sentencing statutes were amended to refer to an “advisory” instead of a presumptive sentence. Since Moore committed her crimes before the effective date of the amendments, we apply the presumptive sentencing statutes in effect at that time. See Cole v. State, 850 N.E.2d 417, 418 n.1 (Ind. Ct. App. 2006).

Twelve (12) years of age at the time this occurred. That you violated perhaps the most sacred position of trust that we know, that of parent and child, and that throughout these proceedings, at least in my eyes, you have shown a genuine lack of remorse and in fact, almost a total ambivalence to what's going on during this series of events. The other aggravators the Court will adopt as its own in this case, with the understanding that Six (6) and Eight (8) will merge. On the mitigating side, the Court finds that there is a lack of any significant criminal history. The prior conviction that you testified to, that you have, the Court will find that it existed, but without any written documentation, the Court will find that it is not a significant aggravator, but in fact an aggravator. In weighing these aggravating and mitigating factors, Miss Moore, I can come to no other conclusion, other than the aggravators far, far outweigh the mitigators in this case . . . [t]o justify on the A Felony, the fully aggravated sentence of Fifty (50) years, on the Battery, the fully aggravated sentence of Three (3) years, and on the False Informing, Six (6) months. The Court has considered the same aggravators and the same mitigators in determining whether these sentences should be consecutive or concurrent to each other and the Court has also considered that they are separate and distinct crimes, separated by time and the fact that they require totally different elements of proof. And based upon that, the Court is [ordering] those sentences consecutive to one another, for a total of Fifty-Three and One-Half (53 1/2) years.”⁷ Tr. at 1965-66.

A. Improper Aggravating Factors

⁷ The trial court's written sentencing order substantially follows its oral sentencing statement:

“The Court, having reviewed the Pre-sentence Investigation Report prepared by the Probation Department[,] having heard evidence, and having heard the arguments of counsel finds the following significant aggravating factors: the victim was less than twelve (12) years of age; the Defendant violated the most sacred position of trust (parent-child); and a lack of genuine remorse and a total attitude of ambivalence throughout this case. The Court further finds the following aggravating factors: nature and circumstances of this crime are more heinous than necessary to prove the elements of the crimes; the child was physically infirm due to prior beatings; the Defendant had a prior conviction for Domestic Battery as admitted by her at trial, and during discovery, although she denied it at sentencing. (without written proof of the conviction, the Court will consider this as a non-significant aggravator); previous beatings by Defendant of S.M.; lack of cooperation with law enforcement; and her prior history of abuse. The Court finds the following mitigating factor: the Defendant's lack of any significant criminal history. The Court, in weighing the aggravating factors against the mitigating factor, finds that the aggravating factors far outweigh the mitigating factor warranting the imposition of an aggravated sentence.” App. at 481-82.

Moore claims that several of the aggravating factors relied upon by the trial court were improper. One of the aggravators which Moore claims was improperly relied upon is S.M.'s age. Moore claims that the fact that S.M. was under the age of twelve is already an element of the crimes committed. To convict her of neglect of a dependent, the State was required to prove beyond a reasonable doubt that Moore was a person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally placed the dependent, i.e. S.M., in a situation which endangered S.M.'s life or health. See I.C. § 35-46-1-4(a)(1). This offense is elevated to a Class A felony if it is committed by a person at least eighteen years of age and results in the death of a dependent who is less than fourteen years of age. See I.C. § 35-46-1-4(b)(3). Moore's battery conviction was similarly elevated because it was committed by a person at least eighteen years of age and resulted in bodily injury to a person less than fourteen years of age. See I.C. § 35-42-2-1(a)(2)(B).

Generally, where the age of the victim is a material element of the crime, the age of the victim may not be used as an aggravating circumstance. Kien v. State, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003), trans. denied; see also Edwards v. State, 842 N.E.2d 849, 854 (Ind. Ct. App. 2006). However, a trial court may consider the particularized factual circumstances of the case to be an aggravating factor.⁸ Kien, 782 N.E.2d at 414; Edwards, 842 N.E.2d at 854. A trial court may properly consider as aggravating the age of the victim when the trial court considers that the victim was of a "tender age." Kien,

⁸ Indiana Code § 35-38-1-7.1(a)(4) (Burns Code Ed. Repl. 2004) required the trial court to consider whether the victim was less than twelve years old.

782 N.E.2d at 414 (citing Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988)); Buchanan v. State, 767 N.E.2d 967, 971 (Ind. 2002).

Here, the jury found that S.M. was five years of age, and the trial court could properly consider this fact, not the statutory element that S.M. was a dependent who was less than fourteen, as an aggravating factor to justify enhancing Moore's sentence. See Kile v. State, 729 N.E.2d 211, 214 (Ind. Ct. App. 2000) (holding that the trial court did not err by using the particularized factual circumstances of the case, namely the victim's young age, as an aggravating factor in enhancing conviction for neglect of a dependent); Mallory v. State, 563 N.E.2d 640, 648 (Ind. Ct. App. 1990) (holding that the trial court did not err in considering that the neglect of a very young child is worse than the same behavior toward an older, more capable dependent), trans. denied. Thus, the trial court did not err in considering as aggravating the fact that S.M. was only five years old at the time of the neglect which led to his death.⁹

In a somewhat related claim, Moore argues that the trial court erred in considering that she was in a position of trust with S.M. which she violated. Moore argues that the

⁹ Moore relies upon Nybo v. State, 799 N.E.2d 1146 (Ind. Ct. App. 2003), in which the defendant was convicted of neglect of a dependent. Upon appeal, the Nybo court noted the general prohibition against using a material element of the crime as an aggravating factor. Id. at 1151. The court then held that the trial court's consideration of the fact that the victim was an infant was improper because "dependent" as defined by statute includes an unemancipated person who is under eighteen years of age. Id. at 1151 (citing Ind. Code § 35-46-1-1). The Nybo court, however, made no mention of the proposition that a trial court may consider the particularized factual circumstances of the case, such as the "tender age" of the victim, to be an aggravating factor. To the extent that the Nybo opinion can be read to strictly prohibit the use of the particular age of the victim as an aggravating factor any time the age of the victim is also an element of the crime, it is contrary to established precedent and we decline to follow it. As clearly explained by our Supreme Court, the fact that the victim was of a "tender age" may properly be considered as an aggravating factor despite the fact that the age of the victim is also a material element of the crime. See Stewart, 531 N.E.2d at 1150 (trial court properly considered as aggravating factor that victim was three years old even though age of victim was material element of crime of child molesting).

“position of trust” is essentially a material element of the crime of neglect of a dependent. According to Moore, any person who neglects a dependent violates a position of trust. This argument has some merit, and if the trial court had generically referred to a “position of trust” aggravator, we might agree with Moore that such would be improper given that the victim’s dependent status is a material element of the crime. However, the trial court here considered as aggravating the particular circumstances of the case, which is proper. See Kien, 782 N.E.2d at 414. The trial court here did not consider as aggravating the fact that S.M. was a dependent; it considered as aggravating that S.M. was Moore’s own son and that she violated “perhaps the most sacred position of trust that we know, that of parent and child.” Tr. at 1965. The trial court did not err in considering this as an aggravating circumstance. See Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005) (holding, in the course of a Blakely discussion, that the trial court’s consideration of “position of trust” aggravator was a “legitimate aggravating circumstance” in enhancing conviction for neglect of a dependent).

Moore next argues that the trial court improperly considered as an aggravating factor her lack of remorse. Moore claims that requiring her to show remorse would necessarily violate her right against self-incrimination. We disagree. A trial court may properly consider as aggravating the defendant’s lack of remorse. Cox v. State, 780 N.E.2d 1150, 1158 (Ind. Ct. App. 2002). However, a trial court may not enhance a sentence because the defendant consistently maintained her innocence if the defendant does so in good faith. Id. A lack of remorse is displayed by a defendant when she

displays disdain or recalcitrance, the equivalent of “I don’t care,” which is to be distinguished from the right to maintain one’s innocence, i.e., “I didn’t do it.” Id.

Here, in considering Moore’s lack of remorse, the trial court did not refer to Moore’s maintenance of innocence. To the contrary, the trial court referred to Moore’s “genuine lack of remorse and in fact, almost a total ambivalence to what’s going on during this series of events.” Tr. at 1965. This fits squarely within the “I don’t care” attitude which a trial court may properly consider as aggravating. See Cox, 780 N.E.2d at 1158. Moreover, we give substantial deference to the trial court’s evaluation of remorse because the trial court has the ability to directly observe the defendant and is in the best position to determine whether the remorse is genuine. Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). Here, Moore refers us to nothing which would cause us to second guess the trial court’s determination that Moore showed no remorse.

Moore next contends that there is nothing about the particular circumstances of the present case which justify the trial court’s consideration thereof as an aggravating factor. Moore specifically claims that, based upon the material elements of the crime of neglect of a dependent, “there is nothing that would make Moore’s crime of neglect of a dependent under 14 causing death to raise it to an outrageous level.” Appellant’s Br. at 12. Again, we disagree. Generally, the nature and circumstances of a crime is a proper aggravating factor. McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001). The nature and circumstances of the present crime are particularly egregious. Moore herself beat and abused S.M. and knew that Rohr had beaten S.M. on prior occasions, even requiring her to talk to Rohr about how hard he hit the child. In addition to the fatal brain injury

suffered by S.M., the five-year-old child was covered with over seventy-seven bruises. Moore left S.M. in the care of a man whom she knew to be brutally physically abusive towards him, the end result of which was the violent, tragic death of a five-year-old boy. We certainly cannot fault the trial court for considering the particular nature of this crime as an aggravating circumstance.

Moore also claims that the trial court erred in considering as an aggravating factor the fact that she did not cooperate with the police. The State concedes that this is an improper aggravating factor. See Angleton v. State, 714 N.E.2d 156, 160 (Ind. 1999) (holding that trial court erred in considering as an aggravating factor that defendant did not confess or cooperate with the police), cert. denied, 429 U.S. 1132 (2000). The State also correctly observes that this factor was specifically not listed by the trial court as among the significant aggravating factors. Consideration of this improper, but not significant, aggravator does not by itself require remand for resentencing. See id.

Moore next attacks the trial court's consideration of the fact that S.M. was physically infirm due to prior abuse from Moore, at least as it was used to aggravate the sentence imposed upon the neglect conviction. Moore claims that these circumstances have no bearing upon the neglect charge, which was based upon Moore leaving S.M. with Rohr. Presuming that the trial court did apply this aggravator as justification to enhance the neglect conviction, we see no error. The fact that S.M. was physically infirm due to prior abuse by Moore makes her decision to leave the weakened child in the custody of Rohr, whom she knew physically abused S.M., even more culpable.

B. Overlooked Mitigator

Moore also claims that the trial court failed to consider as mitigating the fact that the neglect conviction was based upon circumstances that are unlikely to recur. Moore claims that because Rohr is incarcerated¹⁰ and that her conviction is based upon a scenario in which another person intentionally murdered her son, it is “virtually impossible” for a similar scenario to recur. This argument is unpersuasive. We remind Moore that a trial court is not required to find mitigating circumstances, nor is it obligated to accept as mitigating each of the circumstances proffered by the defendant. Ousley v. State, 807 N.E.2d 758, 761 (Ind. Ct. App. 2004). Accordingly, the finding of a mitigating circumstance is within the trial court’s discretion. Id. A trial court does not err in failing to find a mitigating factor when the presence of a mitigating factor is highly disputable in nature, weight, or significance. Id. at 761-62. Only when a significant mitigator is clearly supported by the record is there a reasonable belief that the mitigator was overlooked. Id. at 762.

Here, while it is impossible for Moore to commit the exact same crime because her son was killed, it is not this precise scenario about which we are concerned. If Moore were given a more lenient sentence, her history of abusing her own son and lack of concern faced with the abuse of her son by her boyfriend does not convince us that she would never again neglect or abuse another child. Indeed, Moore had given birth to another child with Rohr. Moreover, as noted by the State, Moore had previously lived

¹⁰ Rohr was incarcerated at the time of the initial filing of Moore’s brief, but his conviction has since been reversed by our Supreme Court. Thus, while Rohr is likely incarcerated awaiting retrial, there is no guarantee that he will remain so.

with S.M.'s father, with whom Moore had an abusive relationship. Given Moore's history of abusive relationships, her own abuse of S.M., and her tolerance of Rohr's abuse of S.M., we cannot say that the trial court erred in failing to consider as a mitigator Moore's claim that the circumstances leading to her conviction were unlikely to recur. See Brown v. State, 770 N.E.2d 275, 282 (Ind. 2002) (rejecting defendant's contention that she was unlikely to again neglect a dependent where her trial testimony revealed a history of abusive relationships).

C. Appropriateness of Sentence

Moore lastly claims that her sentence is inappropriate. Pursuant to Indiana Appellate Rule 7(B), this court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

In challenging the appropriateness of her sentence, Moore claims that she is not deserving of the maximum sentence because her crime of neglect of a dependent resulting in death was due to Rohr's voluntary conduct. Although Moore's neglect might have been an act of omission, most cases of neglect are by definition the failure to do something. It is not the case here that Moore was unaware of Rohr's abusive behavior toward S.M. She knew of such yet failed to take any action to prevent it and even left her child in Rohr's care. Moore points out the obvious fact that, if Rohr had not beaten her son to death, her act of leaving the child with him would not have been a crime. The bottom line in this case is that Moore *did* leave her son with Rohr, who subsequently *did*

beat the child to death. That things might have gone differently does not mean that Moore's sentence is inappropriate.

It has been stated that the maximum sentence should generally be reserved for the worst offenders and offenses. Sloan v. State, 794 N.E.2d 1128, 1135 (Ind. Ct. App. 2003), trans. denied. This proposition should not, however, be taken as a guideline to determine whether a worse offender or offense can be imagined, as it will always be possible to identify or hypothesize a significantly more despicable scenario. Id. Thus, although we say that maximum sentences are ordinarily appropriate for the worst offenders and offenses, we refer generally to the class of offenses and offenders that warrant the maximum punishment. Id. And this encompasses a considerable variety of offenses and offenders. Id. Given the facts and circumstances of the present case as detailed above, we cannot say that Moore is not among the worst offenders and that her crimes are not among the worst offenses.

We also reject Moore's claim that her sentence is inappropriate because it differs significantly from that imposed upon the defendant in Nybo, supra. The majority in Nybo ultimately concluded that the defendant's maximum eight-year sentence was inappropriate and remanded for imposition of the presumptive four-year sentence.¹¹ 799 N.E.2d at 1152. Even were we to agree with the majority in Nybo,¹² it does not control the present case. The defendant in Nybo was charged and convicted of neglect of a

¹¹ Judge Barnes dissented and acknowledged that the trial court had relied upon the immunized testimony by the defendant but nevertheless concluded that the aggravating circumstances in that case, especially the death of a child, were more than sufficient to support the trial court's sentence. Nybo, 799 N.E.2d at 1152 (Barnes, J., dissenting).

¹² See note 8, supra.

dependent as a Class C felony, for which the maximum sentence was eight years. Moore was charged with neglect of a dependent as a Class A felony. Even the minimum sentence for a Class A felony—thirty years—would be seven and a half times longer than the revised sentence imposed in Nybo. Moreover, the trial court in Nybo improperly relied upon the defendant’s immunized testimony in imposing sentence and also expressed disagreement with the State’s decision to charge her with neglect as a Class C felony. 799 N.E.2d at 1151. As discussed, the trial court here relied upon several proper aggravating factors to enhance Moore’s sentence.

The nature of Moore’s offenses are particularly grievous. Moore beat her own five-year-old son and left him in the care of Rohr, a man whom she knew had previously savagely beaten the child. Rohr subsequently caused the child’s death. Even though she might not have actually lied during the investigation of her son’s death, at least with regard to her prior involvement with “CPS,” neither was she entirely forthcoming. A consideration of Moore’s character leads us to the conclusion that her sentence is not inappropriate. Again, Moore had a history of physically abusing her own son. Her indifference to her son’s welfare led to the child being brutally beaten by Rohr and, ultimately, his untimely death. Giving due consideration to the trial court’s decision, and considering the nature of the offense and the character of the offender, we hold that Moore’s maximum sentence is not inappropriate.

Conclusion

The evidence presented by the State is insufficient to support Moore’s conviction for false informing because what she told to the investigators, while not entirely truthful,

was not technically false. The trial court is ordered to vacate this conviction and the sentence thereon. Reversal of this conviction, however, does not require retrial on Moore's remaining convictions. Further, even though the trial court listed one improper aggravator, the remaining aggravators are sufficient to support the sentence imposed by the trial court. Lastly, given the nature of the offense and the character of the offender, we cannot conclude that the trial court's sentence is inappropriate.

The judgment of the trial court is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this opinion.

ROBB, J., concurs.

VAIDIK, J., concurs in part and dissents in part with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

DONNA MOORE,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 40A01-0607-CR-319
)	
STATE OF INDIANA,)	
)	
Appellee.)	
)	

VAIDIK, JUDGE, concurs in part, dissents in part

I respectfully dissent from the majority's conclusion that the evidence is insufficient to support the jury's verdict convicting Moore of false informing. In all other respects, I concur.

In order to sustain Moore's conviction for false informing as charged in this case, the State must have proved that Moore gave false information in the official investigation of the commission of a crime, knowing the information to be false, which substantially hindered any law enforcement process. Ind. Code § 35-44-2-2. The State alleged that Moore violated this statute by denying previous welfare investigations concerning S.M. during the investigation of S.M.'s severe head injury. Appellant's App. p. 40.

The record shows that the Jennings County Sheriff's Department and the Indiana Department of Child Services extensively questioned Moore about prior instances of abuse to S.M. During this interview, the investigators asked Moore if she had been

involved with “CPS in Ohio.” State’s Ex. 15 at 9. Notably, Moore did not indicate that she did not know what “CPS” meant; instead, she emphatically answered, “No I have not.” *Id.* A reasonable inference from this exchange is that even though the investigators used the acronym “CPS,” Moore knew they were talking about her involvement with a child welfare agency in Ohio.

Immediately thereafter, the investigators questioned Moore about her involvement with the police and whether there were “records” in Ohio. *Id.* Again, Moore said, “Nope.” *Id.* Importantly, this took place in the middle of a conversation about prior instances of abuse to S.M. A reasonable inference from this exchange is that the investigators were referring to records of S.M. being abused, whether police records or child welfare records. Although there were no police records, there were in fact records of an investigation in Ohio by the Belmont County Department of Job and Family Services, Children Services Division.

When reviewing the sufficiency of the evidence to support a conviction, “appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict.” *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007) (quoting [McHenry v. State](#), 820 N.E.2d 124, 126 (Ind. 2005) (emphasis added)). It is not necessary that the evidence “overcome every reasonable hypothesis of innocence”; rather, “the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” *Id.* at 147 (citations omitted). The reasonable inferences supporting the jury’s verdict concerning Moore’s interview with the Jennings County Sheriff’s Department and the Indiana Department of Child Services are that she knew she was being questioned generally

about prior welfare investigations of S.M. but still said no. As such, I believe the evidence is sufficient to prove that Moore gave false information, knowing that information to be false, and therefore I would affirm her conviction for false informing.